IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

UNITED STATES OF AMERICA, for the use and benefit of ENVIR-O-MAN, INC., et al.,	)	
Plaintiffs,	)	CIVIL NO. 1998-143, 1998-144 and 1998-145 (consolidated)
v.	)	
THE MOUNTBATTEN SURETY COMPANY, INC., and HAP CONSTRUCTION, INC.,	)	
Defendants.	)	

APPEARANCES

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Attorney for Plaintiffs

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Memorandum Opinion

Finch, C. J.

This matter comes before the Court on Defendant Mountbatten Surety Company, Inc.'s

("Mountbatten") Motion for Summary Judgment. For the reasons expressed below, the Court will deny Mountbatten's motion.

I. Background

Pursuant to Section 270b(b) of the Miller Act, the instant action has been brought in the name of the United States of America for the use and benefit of the aggrieved parties, Envir-O-Man, Inc. ("EOM"), Charter Holding, Inc. a/k/a Charter Leasing ("Charter") and ABC Ready Mix, Inc. a/k/a Treaco Pest Control, Inc. d/b/a Treaco Leasing ("Treaco"). In 1996, the Government of the Virgin Islands (the "Government") entered into a contract with Defendant HAP Construction ("HAP") for debris site grinding and bailing at Body Slob and Cramers Park located in St. Croix, U.S.V.I. (the "Project"). Defendant Mountbatten, as surety, issued a payment bond for the Project, with HAP as its principal, and naming the Government as obligee.

Plaintiffs filed suit on or about June 5, 1998, alleging that each was a subcontractor to HAP on the Project, and that each has not been paid by HAP or Mountabatten for work performed on the Project. Mountbatten argues that Plaintiffs last performed work on the Project on April 15, 1997, and are therefore barred from bringing their claim pursuant to the Miller Act's one-year statute of limitations. Plaintiffs argue that work on the Project did not end prior to June 18, 1997, the date the Project was completed. Additionally, Plaintiffs contend that labor and materials were supplied to Defendants up until October, 1997.

Mountbatten has also moved to deem its motion for summary judgment as conceded under Fed. R. Civ. P. 56 and LRCi 7.1(j). In the alternative, Mountbatten argues that the Court should not consider the affidavits relied upon by Plaintiffs in their Further Opposition to Motion for Summary Judgment ("Further Opposition"), because Plaintiffs' Further Opposition is not a

proper pleading permitted by LRCi 56.1.

II. Analysis

A. Summary Judgment Standard

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute involving a material fact is "genuine" where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In determining whether such genuine issues exist, the Court must resolve all reasonable doubts in favor of the nonmoving party. Christopher v. Davis Beach Co., 15 F.3d 38, 40 (3d Cir. 1994).

B. The Miller Act

Suits brought pursuant to, and in enforcement of, the Miller Act must be commenced within one year after the claimant last performed work or supplied material for the project.

> Every suit initiated under this section shall be brought in the name of the United States for the use of the person suing . . . *but no suit shall be commenced after the expiration of one year after the day which the last of the labor was performed or material was supplied by him* . . . .

40 U.S.C. § 270(b) (emphasis added).

Mountbatten argues that the Miller Act requires that Plaintiffs commence their action within one year from the last day Plaintiffs themselves performed work or supplied material for the Project, rather than from the last day that any work was performed by any entity on the Project. See U.S. for the Use of Weithman v. Buckeye Union Casualty Co., 207 F.Supp. 552,

554 (N.D. Ohio 1962). Mountbatten further argues that Plaintiffs misconstrue the statute of limitations requirement of the Miller Act. Mountbatten is mistaken in this argument. Plaintiffs' argument is based not upon the reading of the Miller Act, but rather upon the correct date on which Plaintiffs themselves last performed work or supplied material for the Project.

C. The Motion to Deem Summary Judgment Conceded

Fed. R. Civ. P. 56 provides that if the adverse party does not respond, summary judgment, if appropriate, shall be entered against the adverse party. Local Rule 7.1(j) provides that "[u]pon failure of respondent to file a response and brief in opposition to the motion, the court *may* treat the motion as conceded and render whatever relief is asked for in the motion." LRCi 7.1(j)(emphasis added). In the instant case, Plaintiffs filed their Opposition after the date to do so had expired.[1] As the local rule indicates, it is within the Court's discretion as to how to treat a failure to respond to the moving party. The Court finds that Plaintiffs have sufficiently explained their reason for filing a late response. Plaintiffs submit evidence of their attempt to retrieve the contract file from the Department of Property and Procurement and of that Department's failure to respond to Plaintiffs. Moreover, the information contained in that file—namely, the date that work was last completed on the Project—is essential to Plaintiffs' claim. Therefore, in the interest of justice, the Court will consider Plaintiffs' Opposition even though it is an untimely response.

D. The Further Opposition

[1] Local Rule 7.1(f) provides that "[i]f a respondent opposes a motion, he shall file his response, including brief and such supporting documents as are then available, within ten (10) days after service of the motion." In the instant case, Mountbatten filed its Motion for Summary Judgment on or about April 1, 1999. Plaintiffs did not file their response to that motion until June 21, 1999.

Defendant argues that Plaintiffs' Further Opposition should not be considered by the Court because it is not a proper pleading under LRCi 56.1. The Court finds that because the Further Opposition submitted by Plaintiffs consists entirely of supporting affidavits, it is in essence supplemental and will be considered as such.

E. The Affidavits

In support of Plaintiffs' argument that work on the Project was not completed prior to June 18, 1997, they offer the affidavit of Plaintiffs' attorney, Edward Jacobs, dated July 22, 1999.

Jacobs' affidavit provides, in relevant part:

> [O]n July 7, 1999, I personally reviewed the file provided to my office by the Department of Property and Procurement . . . in which was a June 17, 1997 letter from Mr. Ike Bracy of HAP Construction to Mr. Harold Thompson of the Department of Public Works informing Mr. Thompson that the project would be completed by the following day, June 18, 1997 . . . .

Affidavit of Jacobs (July 22, 1999).

In addition to Plaintiffs' contention that work on the Project was not completed prior to June 18, 1997, Plaintiffs argue that labor and material were supplied to Defendants until October 1997—the time when the contracts were considered complete.[2] Plaintiffs claim that based on conversations with Dean Friese, the project manager for Charter, Treaco and EOM, the contracts were not considered complete until recyclable metals had been bundled and shipped off-island for recycling. See id. Plaintiffs aver that based upon these same conversations with Friese, this work for the shipment of the metal was not completed until approximately October 1997. See id. In

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[2] Mountbatten is correct that the relevant issue under the Miller Act is not when the contract ended, but rather when labor was last performed and/or material was last supplied. However, in the instant case, the issue of when the contract was completed is directly related to the issue of when labor and material were last supplied.

support of their argument, Plaintiffs submit not only the July 22 affidavit of Jacobs, but also the following: (1) the affidavit of Joyce Beard, president of Charter and Traeco, dated July 15, 1999; and (2) the affidavit of Farrell Killingsworth, president of EOM, dated July 15, 1999.

Jacobs' affidavit states, in relevant part:

> I was told by Mr. Dean Friese that he was involved from the beginning of the project until it ended sometime in October 1997 when the scrap metal was shipped off-island. . . . Mr. Friese also told me that HAP Construction had possession of all equipment from Charter and Traeco until the end of the project, and that HAP Construction still has possession of all the equipment.

Affidavit of Jacobs (July 22, 1999)(emphasis in original).

Beard's affidavit states, in pertinent part, that Traeco and Charter provided equipment to HAP to be used in conjunction with the Project, and that Friese was the project manager for Charter and Treaco and "on site in the Virgin Islands from the beginning of the contract(s) until its completion." Affidavit of Beard (July15, 1999). Killingsworth's affidavit provides, in pertinent part, that EOM provided HAP with the personnel for the operation of the equipment to be used in conjunction with the Project, and that Friese was the project manager for EOM and "on site in the Virgin Islands from the beginning of the contract until its completion." Affidavit of Killingsworth (July15, 1999).

Plaintiffs contend that based on the above affidavits, the services of EOM in the person of Friese were available and used by Defendant HAP all the way through the end of the contract. Additionally, Plaintiffs argue that HAP had possession and use of the equipment provided by Traeco and Charter all the way through the end of the contract and beyond. Therefore, Plaintiffs aver that because labor and materials were supplied to Defendants until October 1997, Plaintiffs' lawsuit was filed well within the one-year Miller Act requirement.

Mountbatten presents two arguments as to why the Court should not consider Plaintiffs' affidavits. First, Mountbatten argues that Jacobs' affidavit may not be considered by the Court because the affidavit contains inadmissible hearsay in the form of statements of Friese. Mountbatten is incorrect. The law states that "[h]earsay evidence produced in an affidavit opposing summary judgment may be considered . . . if the out-of-court declarant could later present that evidence through direct testimony in a form that would be admissible at trial." Williams v. Borough of West Chester, Pa., 891 F.2d 458, 466, n.12 (3d Cir. 1989)(citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)). Assuming that Friese could testify at trial as to the date he completed work on the Project, that testimony would be admissible.

Second, Mountbatten argues that the affidavits submitted by Plaintiffs in support of their Further Opposition contradict their earlier affidavits, and therefore cannot preclude summary judgment. In support of its argument, Mountbatten points to the earlier affidavits of Beard and Killingsworth, dated January 14, 1998 and February 3, 1998 (the "earlier affidavits"). In the earlier affidavits, Beard and Killingsworth each state that Plaintiffs last supplied their labor or material to Defendants on April 15, 1997. Mountbatten argues that the earlier affidavits are contradicted by the affidavits submitted with Plaintiffs' Further Opposition. Plaintiffs submitted three affidavits with their Further Opposition, one from Beard, dated July 15, 1999, one from Killingsworth, also dated July 15, 1999, and one from Jacobs, dated July 22, 1999. The July 15, 1999 affidavits of Beard and Killingsworth do not provide any date for when labor or material were last supplied, and therefore do not directly contradict their prior affidavits. However, Jacobs' affidavit, stating that "the project would be completed . . . by June 18, 1997," does directly contradict Beard's and Killingsworth's earlier affidavits. Affidavit of Jacobs (July 22,

1999).

Courts have held that a party cannot create a genuine issue of fact sufficient to defeat summary judgment simply by contradicting his or her *own* previous sworn statement without explaining the contradiction or attempting to resolve the disparity. See Martin v. Merrell Dow Pharmaceuticals, Inc., 851 F.2d 703, 706 (3d Cir. 1988)(emphasis added); see also RSBI Aerospace, Inc. v. Affiliated FM Ins. Co., 49 F.3d 399, 402 (8th Cir. 1995); Russell v. Acme-Evans Co., 51 F.3d 64 (7th Cir. 1995); Barwick v. Celotex Corp., 736 F.2d 946, 960 (4th Cir. 1984). However, this rule has only been applied to situations where an affiant contradicts his *own* previous sworn statement, rather than situations such as the one at bar where two different affidavits, submitted by two different Plaintiffs' affiants, contradict one another. See, Martin, 851 F.2d 703 (affirming district court's holding that no genuine issue of material fact existed where party contradicted his own prior sworn testimony); RSBI Aerospace, 49 F.3d 399; Russell, 51 F.3d 64; Barwick, 736 F.2d 946; see also, Williams v. Home Depot, U.S.A., Inc., 1999 WL 788597 (E.D.Pa. 1999)(citations omitted)(a nonmoving party cannot create a genuine issue of material fact to prevent summary judgment by submitting an affidavit of a witness which contradicts that witness' prior sworn testimony); Maietta v. U.P.S., 749 F.Supp 1344, 1359 (D.N.J. 1990)(same); Moore v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 1991 WL 149881 (D.N.J. 1991)(same); CIT Group/Equip. Fin., Inc. v. Rosenblum, 1991 WL 208864 (D.N.J. 1991)(summary judgment is appropriate where the plaintiff directly contradicts her own earlier statements without explaining the contradiction or attempting to resolve the disparity); Barticheck v. Fidelity Union Bank/First Nat'l State, 680 F. Supp. 144 (D.N.J. 1988)(same). Therefore, because Jacobs does not directly contradict his *own* previous sworn statement, the law does not

prevent the Court from considering Jacobs' affidavit.

Moreover, Plaintiffs have offered a satisfactory explanation for the discrepancy in the sworn statements. Plaintiffs submit the affidavit of John M. Sansom, financial account for EOM, Charter and Treaco to explain why the earlier sworn statements of Beard and Killingsworth are in conflict with Jacobs' later sworn statement. Sansom's affidavit provides, in relevant part:

> On April 21, 1997, . . . the affiant discussed the [Project] with Ike Bracy who advised affiant that the contract ended on April 15, 199[7].[3] The affiant learned later that the contract, in fact, had ended on June 18, 199[7].[4] . . . Relying upon the representation made by Ike Bracy, affiant provided the date of April 15, 1997, as the date the contract ended to the corporate officers for [EOM], [Charter] and [Treaco]--Farrell Killingsworth and Joyce Beard, who later made affidavits in reliance upon the statement made to John M. Sansom by Ike Bracy.

Affidavit of Sansom (September 30, 1999).

The Court finds that Samson's affidavit provides a satisfactory explanation for the conflicting dates given by Plaintiffs. Therefore, Jacobs' affidavit is sufficient to create a genuine issue of material fact as to the date Plaintiffs last performed work and/or supplied materials for the Project.

III. Conclusion

In accordance with the attached Order, Mountbatten's Motion for Summary Judgment is denied.

ENTER:

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[3] The affidavit reads, in error, April 15, 1999. The Court recognizes this as a typographical mistake on the part of the affiant.

[4] Again, the affidavit incorrectly reads June 18, 1999.

DATED: February ____, 2000

_____
RAYMOND L. FINCH
U.S. DISTRICT JUDGE

A T T E S T:
Orinn F. Arnold
Clerk of Court

by: _____
Deputy Clerk

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ORDER

Presently before the Court is Defendant Mountbatten Surety Company, Inc.'s Motion for Summary Judgment brought pursuant to Fed. R. Civ. P. 56. Having fully considered the arguments and the submissions of the parties, it is hereby

ORDERED that Defendant's Motion for Summary Judgment is **DENIED**.

ENTER:

DATED: February ____, 2000

RAYMOND L. FINCH
U.S. DISTRICT JUDGE

A T T E S T:
Orinn F. Arnold
Clerk of Court
by: _____
Deputy Clerk

cc: Edward Jacobs, Esq.
John W. DiNicola, II, Esq.
Nancy D'Anna, Esq.